No. 379

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United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter of the Application of the United States for an Order Compelling

EARL J. CARROLL

to comply with an Internal Revenue summons.

EARL J. CARROLL,

Appellant,

INTERNAL REVENUE SERVICE,

Appellee.

(M18-304)

APPENDIX TO APPELLANT'S BRIEF

On Appeal from the United States District Court for the Southern District of New York

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In the Matter of the Application of the United States for an Order Compelling

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EARL J. CARROLL,
Appellant,

INTERNAL REVENUE SERVICE,
Appellee.

(M18-304)

Extract of Docket Entries.

Aug. 23-56	Filed order that Earl J. Carroll appear before Int. Rev. Service, Palmieri, J.
Aug. 29-56	Filed copy of order for Earl J. Carroll to appear for questions by Int. Rev. with affdvt. of service.
Oct. 15-56	Filed affdvt & notice of motion to vacate order of 8-22-56 re: Earl J. Carroll, etc. ret. 10-16-56.
Oct. 15-56	Filed affdvt of B. V. Roberts re Earl J. Carroll.
Jan. 3-57	Filed Reply affidvt re Motion to Vacate as to Earl J. Carroll.
Jan. 3-57	Filed Opinion #23,149. Motion to vacate order directing Earl J. Carroll to obey Int. Rev. summons denied. Edelstein, J. Mailed notice of entry 1-3-57.
Jan. -57	Filed Notice of Appeal.

Order Directing That Earl J. Carroll Appear Before Internal Revenue Service.

(1) Upon the affidavit of BERNARD V. ROBERTS, sworn to on August 21, 1956, and upon the affidavit of FOSTER BAM, Assistant United States Attorney for the Southern District of New York, sworn to on August 22nd, 1956, it is

ORDERED that respondent EARL J. CARROLL appear at Room 1009, 90 Church Street, New York, New York, between the hours of 10:30 and 11:00 A. M. on August 28, 1956 and answer all questions asked of him pursuant to an Internal Revenue Service summons served upon him on December 6, 1955 concerning:

(1) the contractual and financial terms and arrangements between respondent and Alfried Krupp von Bohlen and Halback during the years 1944 to 1954 inclusive;

(2) the contractual and financial terms and arrangements between respondent and Frederick Flick during the years 1944 to 1954 inclusive;

(3) all sums of money received, as legal fees or otherwise, and disbursed in the Krupp and Flick matters, and in relation to courts martial or other activities engaged in by respondent in Germany or other foreign countries during the years 1944 to 1954 inclusive, and it is further

(2) ORDERED that respondent produce all books, records, cancelled checks, memoranda and papers of whatsoever kind or nature pertaining to income or monies received, accrued or credited to his account during the years 1944 to 1954 inclusive, and it is further

ORDERED that service of this order by an officer of the Internal Revenue Service on respondent on or before August 27, 1956 shall be deemed good and sufficient service.

Dated: New York, N. Y., August 22, 1956.

EDMUND L. PALMIERI,
U. S. D. J.

Affidavit of Foster Bam, in Support of Motion for an Order Directing Earl J. Carroll to Appear Before Internal Revenue Service.

(3)

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

FOSTER BAM, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, and am familiar with this matter.

2. The United States Attorney has been requested by the Treasury Department to apply to this Court for an order directing the respondent EARL J. CARROLL to comply with a summons as appears more fully from the affidavit of BERNARD V. ROBERTS.

3. I am informed by Mr. Roberts that the respondent is presently in Miami, Florida, and that he will not return to New York until Sunday, August 26, 1956.

4. I am informed by Mr. Roberts that the respondent appeared and gave some testimony in response to an Internal Revenue Service summons; that the examination was adjourned, and that respondent has agreed to submit to a continuation of the examination on Monday, August 27, 1956.

5. I am further informed, however, that respondent refused to produce certain documents and to answer certain questions at his prior examination, and that (4) respondent's prior actions and his statements to Internal

Revenue Service officials, and the statements of his attorney, indicate that he will again refuse to answer the questions and to produce the books and records as required by the summons, and as more fully appears in the affidavit of Mr. Roberts.

6. Mr. Roberts had advised me that if, on the resumption of the examination, the respondent again refuses to testify and to produce the books and records called for by the summons, he wishes to serve an order of this Court issued pursuant to Section 7604 of Title 26, U.S.C. upon respondent requiring him to comply with the summons.

7. An ex parte order is requested since I am informed that respondent has no permanent residence and moves about a great deal, and that he is likely to leave the jurisdiction after the examination on August 27, 1956, and since he will not be available for service until August 27, 1956.

8. No prior application has been made for this relief.

WHEREFORE, it is respectfully requested that this Court issue an ex parte order requiring respondent to appear on Tuesday, August 28, to comply with the summons.

FOSTER BAM
Foster Bam
Assistant United States Attorney

(Sworn to by Foster Bam, Assistant United States Attorney, on August 22, 1956.)

Affidavit of Bernard V. Roberts, in Support of Motion for an Order Directing Earl J. Carroll to Appear Before Internal Revenue Service.

(5)

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

BERNARD V. ROBERTS, being duly sworn, deposes and says:

1. I am the Coordinator of Special Investigations, International Operations Division, Internal Revenue Service, United States Treasury Department, Washington, D. C.

2. This affidavit is made in support of an ex parte order compelling the respondent, EARL J. CARROLL, to appear before me, or other appropriate agent of the Internal Revenue Service, and answer questions and produce books and records regarding the tax liability of EARL J. CARROLL.

3. Upon information and belief the respondent, EARL J. CARROLL, was subpoenaed to appear before an officer of the Internal Revenue Service in Room 317, Plaza Building, Miami, Florida, on December 29, 1955, at 10:00 A.M., in the forenoon, pursuant to Section 7602, Title 26, U. S. Code; that the said subpoena was duly served upon the respondent; that the respondent has since been granted several extensions of the appearance date at his own request, to procure the necessary records and other reasons; that the respondent duly appeared, at his request, at 745 Fifth Avenue, New York, New York at 10:00 A.M., in the forenoon of August 16, 1956. (A photostat of the original subpoena mentioned is attached to this affidavit as Exhibit A.)

(6) 4. The respondent answered all questions asked of him with the exception of those relating to the following:

(a) The contractual and financial terms between EARL J. CARROLL and Alfried Krupp von Bohlen and Halback during the years 1944 and 1954.

(b) The contractual and financial terms between EARL J. CARROLL and Frederick Flick during the years 1944 and 1954.

(c) Any and all information concerning other income earned in Germany or other foreign countries during the years 1944 to 1954, inclusive.

(Excerpts of the pertinent testimony given by the respondent on August 16, 1956 in support of this affidavit are attached hereto as Exhibit B of this affidavit.)

5. The respondent failed to produce for examination the books, records and papers pursuant to the subpoena described in part 3 of this affidavit.

6. The respondent declined to answer questions relating to the above-mentioned matters on the ground that the Government is compelled to prove the respondent was not a bona fide resident of Germany, as covered by Section 116(a) of the 1939 Internal Revenue Code, or Section 911(a)(1) of the 1954 Internal Revenue Code, before the respondent is obligated to answer questions concerning income earned outside the United States.

7. The respondent declined to produce his books and records on the ground that the Government is compelled to prove the respondent was not a bona fide resident of Germany, as covered by Section 116(a) of the 1939 In-

ternal Revenue Code, or Section 911(a)(1) of the 1954 Internal Revenue Code, before the respondent is obligated to produce his books and records as recited in the subpoena described in part 3 of this affidavit.

8. I have, therefore, requested the United States Attorney to obtain an order from the court pursuant to Section 7604(a) and (b), Title 26, U. S. Code, directing EARL J. CARROLL to appear before a duly (7) authorized officer of the Internal Revenue Service on August 28, 1956, in Room 1009, 90 Church Street, New York, N. Y. and answer questions relating to the above-mentioned matters and to produce the above-mentioned books and records.

9. The reason why the relief sought here is by ex parte order as authorized by Section 7604(a) and (b), Title 26, U. S. Code, is that EARL J. CARROLL, is a member of the bar of the State of California who has placed the burden of proof as to residency on the Government as the ground for his refusal to answer or to produce his records for examination.

10. As Section 116(a), Internal Revenue Code of 1939 and corresponding provisions of the Internal Revenue Code of 1954, provides:

"BONA FIDE RESIDENT OF A FOREIGN COUNTRY—In the case of an individual citizen of the United States, *who establishes to the satisfaction of the Secretary or his delegate that he has been a bona fide resident of a foreign country or countries* for an uninterrupted period which includes an entire taxable year * * *" (italics supplied) it is clearly evident that the burden of proof is on the respondent to establish his claim of bona fide residency.

11. The Internal Revenue Service is presently in the midst of administrative proceedings with respect to the respondent, EARL J. CARROLL, and has every reason to believe the respondent may shortly leave the United States and the jurisdiction of the Internal Revenue Service for some time to come.

12. No previous application has been made for the relief sought herein.

Wherefore, it is respectfully requested that the respondent, EARL J. CARROLL, be issued an ex parte order directing him to answer the questions and to produce the books and records enumerated above.

(Sworn to by Bernard V. Roberts on August 21, 1956.)

Exhibit A, Annexed to Affidavit of Bernard V. Roberts.

(8)

Form. 2039

May 1955

U. S. Treasury Department—Internal Revenue Service

Summons

In the matter of the tax liability of

Earl J. Carroll

Internal Revenue District of San Francisco, California

Period(s) 1944 to 1954, Inclusive

The Commissioner of Internal Revenue

To: Earl J. Carroll

At: Fontainebleau Hotel, Miami Beach, Florida

Greeting:

You are hereby summoned and required to appear before L. Harold Moss, an officer of the Internal Revenue Service, to give testimony relating to the tax liability and/or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the time and place hereinafter set forth: All books, records, cancelled checks, memoranda and papers of whatsoever kind or nature pertaining to income or monies received, accrued or credited to your account during